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No. 97-1249

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, ETC.,
PETITIONER

v.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in rejecting the National Labor Relations Board's determination that the employer violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by subcontracting out all of the work performed by its unionized employees in order to rid itself of the union.

2. Whether the court of appeals erred in rejecting the Board's determination that the employer violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by refusing to bargain with respect to its decision to subcontract out all of the work performed by its unionized employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 120 F.3d 612. The decision and order of the National Labor Relations Board (Pet. App. 26a-35a) and the decision of the administrative law judge (Pet. App. 35a-95a) are reported at 319 N.L.R.B. 401.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1997. Petitions for rehearing were denied on October 31, 1997. Pet. App. 22a-23a. The petition for a writ of certiorari was filed on January 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Automatic" Sprinkler Corporation of America (ASCOA) designs, fabricates, and installs automatic fire protection systems. Pet. App. 2a, 37a.[1] Prior to the events that gave rise to this litigation, ASCOA's employees, known as "sprinkler fitter" workers, were represented by 12 locals of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (the Union). *Id.* at 2a n.1. Petitioner was one of those locals. *Id.* at 2a-3a. Eight of the locals, including petitioner, had majority-representative status among their respective bargaining units pursuant to Section 9(a) of the National Labor Relations Act (the Act), 29 U.S.C. 159(a). Pet. App. 38a. The remaining locals represented the employees in their respective bargaining units on a non-majority basis, as permitted by Section 8(f) of the Act, 29 U.S.C. 158(f). Pet. App. 39a.

ASCOA, through its membership in a multi-employer bargaining association, the National Fire Sprinkler Association, was a signatory to labor contracts with the Union. Pet. App. 2a-3a, 41a-42a. The expiration dates of ASCOA's contracts ranged from July 31, 1993, to June 30, 1995, depending on the local involved. *Id.* at 3a. ASCOA's contracts with 11 of the 12 locals (including petitioner) permitted it to subcontract work to other employers, provided that those

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[1] ASCOA is a division of Figgie International, Inc., which was also a party to the proceedings in the court of appeals. Pet. App. 1a-2a. ASCOA and Figgie are a single integrated business enterprise controlled by Figgie. *Id.* at 2a, 37a-38a, 89a. Because the nominal distinction between the two companies is of no material significance here, we refer to ASCOA and Figgie collectively as "ASCOA."

employers also had signed labor contracts with the Union. *Id.* at 3a, 47a, 83a.

In November 1992, ASCOA adopted a business strategy, known as the "Neutral Plan." The Neutral Plan provided that, in January 1993, ASCOA would become a general contractor, and that, by August 31, 1995, ASCOA would subcontract out all of the sprinkler fitter work that was being performed by its employees in the bargaining units represented by the Union locals. Pet. App. 3a, 42a-46a. According to Owen Stout, ASCOA's President, ASCOA's "primary concern" in developing the Neutral Plan was "to increase its share of the fire protection market by being free from the unions' collective-bargaining agreements' restrictions on subcontracting that forbade [ASCOA] to subcontract to nonunion firms." *Id.* at 43a. An internal company document, known as "Pro Forma III-A," described the "benefits" that would inure to ASCOA under the Neutral Plan as including "[g]ain[ing] control of labor costs on projects," "[e]liminat[ing] labor negotiations," and "[e]liminat[ing] costs associated with union grievances." *Id.* at 44a.

On February 10, 1993, ASCOA withdrew from membership in the National Fire Sprinkler Association. Pet. App. 3a, 46a. On January 28, 1994, ASCOA sent letters to ten of the 12 Union locals (including petitioner) stating that it intended to "terminate" that local's labor contract, effective on its expiration date. The letters also stated that ASCOA had made "a good-faith business decision to permanently and unequivocally alter the basic direction of its business whereby it will no longer employ persons represented by your Union." *Id.* at 4a, 48a-49a, 65a-66a, 68a-72a, 77a. Although ASCOA offered to bargain with the

locals about its decision to subcontract out all of the work being performed by the employees in the bargaining units, ASCOA regarded that decision as irrevocable and not subject to negotiation. *Id.* at 65a; see also *id.* at 32a, 82a. Ultimately, ASCOA discharged the employees represented by the locals and severed its contractual relationships with the locals. *Id.* at 79a, 89a.

2. a. Acting on charges filed by the Union, the National Labor Relations Board's General Counsel issued a complaint against ASCOA, alleging violations of Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. 158(a)(1), (3), and (5). Pet. App. 35a-36a & n.1. Section 8(a)(3) makes it an unfair labor practice for an employer to "discriminat[e]" with regard to hiring, tenure, or terms or conditions of employment in order to "discourage membership in any labor organization." 29 U.S.C. 158(a)(3). Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. 29 U.S.C. 158(a)(5).

After a hearing, the administrative law judge sustained the allegations of the complaint. He concluded that ASCOA had violated Section 8(a)(3) by "terminating the employees represented by all the Local Unions * * * and severing its contractual relationships with [the] Local Unions in order to engage in nonunion subcontracting, thereby discouraging union membership." Pet. App. 89a; see also *id.* at 86a. He found that ASCOA's "primary aim" in adopting the Neutral Plan was "to rid itself of union representation in order to indulge itself in nonunion subcon-

tracting." *Id.* at 85a.[2] He also found that ASCOA had failed to sustain its burden of demonstrating, by a preponderance of the evidence, that it would have developed and implemented the Neutral Plan even "in the absence of union representation of its employees." *Id.* at 86a.

The ALJ further concluded that ASCOA had violated Section 8(a)(5) by failing to give the eight majority-representative locals, including petitioner, "prior notice and an opportunity to bargain" over ASCOA's decision to "subcontract[] all the work being performed for [ASCOA] by its employees represented by [those locals]." Pet. App. 90a; see also *id.* at 86a, 87a. He explained that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment * * * is a statutory subject of collective bargaining." *Id.* at 86a (quoting *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 215 (1964)). He found that "all that happened here was a substitution of one group of workers to perform the work of another," that

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[2] In so finding, the ALJ observed that the Pro-Forma III-A, a company document, "clearly demonstrates [ASCOA's] dislike of the restrictions imposed on it by union representation of its employees, and its desire to be a union-free employer"; that ASCOA "went to considerable pains to mislead the unions into believing that it was merely extending its subcontracting," whereas its "real intent [was] to be nonunion"; and that ASCOA "had carefully avoided any overt subcontracting to nonunion employers prior to its January 28, 1994 notice of intention to destroy all its union sprinkler fitter units * * * even to the extent of misleading its district managers * * * [that] the new program would force [ASCOA] to work directly with the Unions for the benefit of both." Pet. App. 81a-82a.

ASCOA "continues to manufacture, sell, and arrange the installation of sprinkler systems," and that "[t]he only difference is that subcontractors' employees now do the same work as ASCOA's sprinkler fitters had previously done, and utilize the same vehicles, tools, and other equipment ASCOA employees had used to do the same type work." *Id.* at 87a.

While acknowledging that ASCOA's labor agreements "permit subcontracting to other employers signatory to incumbent unions' agreements," the ALJ rejected ASCOA's contention that those subcontracting clauses "constitute waivers of bargaining rights concerning subcontracting during the term of those agreements." Pet. App. 83a. He concluded that the clauses could not be construed to "waive the right to bargain over a decision to destroy bargaining units through the use of subcontracting." *Ibid.*

b. The Board affirmed the ALJ's findings and conclusions. Pet. App. 26a-35a. In concluding that ASCOA violated Section 8(a)(3) of the Act "by subcontracting the unit work and discriminatorily laying off the unit employees," the Board noted that ASCOA's own document, the Pro-Forma III-A, constituted "direct evidence * * * that [ASCOA's] decision to subcontract the unit work was discriminatorily motivated as it sought to rid itself of union-represented employees." *Id.* at 30a.

In concluding that ASCOA also violated Section 8(a)(5) by refusing to bargain with the eight majority-representative locals about the decision to subcontract the work being performed by their members, the Board found it "clear that [ASCOA's] subcontracting decision was a mandatory subject of bargaining"

under *Fibreboard*. Pet. App. 31a.[3] The Board explained that "an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from bargaining when, as here, antiunion considerations are at the heart of the alleged fundamental change in the direction of the corporate enterprise." *Id.* at 32a.

The Board issued a remedial order that required ASCOA, among other things, to reinstate and make whole all employees who were discharged "as a result of the subcontracting" and to bargain with the majority-representative locals "concerning the decision to subcontract and its effect on employees, and for successor collective-bargaining agreements." Pet. App. 32a-35a, 91a-95a.

3. The court of appeals, with one judge dissenting in part, denied enforcement of the Board's order. Pet. App. 1a-21a. The court reversed the Board both on "the issue of [ASCOA's] duty to bargain" under Section 8(a)(5) and on "the issue of [ASCOA's] discrimination against the unions" under Section 8(a)(3). *Id.* at 14a, 15a.

a. On the Section 8(a)(5) duty-to-bargain issue, the court determined that "the language in the collective bargaining agreements * * * unambiguously granted [ASCOA] the authority to subcontract work,

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[3] The Board found that ASCOA "in effect substituted the subcontractors' employees for its own," that ASCOA "continues to install and maintain sprinkler systems," and that "labor costs, which the Local Unions had substantial authority to control, constituted the principal basis for [ASCOA's] subcontracting decision." Pet. App. 31a. The Board also agreed with the ALJ that ASCOA had "presented the Local Unions with a fait accompli and then sought to have them engage in the futile act of bargaining about that decision." *Id.* at 32a.

without limitation, provided it was to contractors that had agreements with the unions." Pet. App. 8a. The court further determined that ASCOA had, in fact, "restricted [its] subcontracting to union contractors" during the term of its contracts with the locals. *Id.* at 8a-9a. The court thus concluded that in "determining that [ASCOA] violated section 8(a)(5) by refusing to bargain with the unions concerning [its] decision to subcontract to union signatories during the term of the agreements, the Board has refused to give meaning and effect to the parties' contractual provisions concerning subcontracting." *Id.* at 9a.

The court further stated that "[a]lthough when a collective bargaining agreement expires, an employer has a continuing duty to bargain in good faith and maintain the *status quo* as to conditions of employment in the expired agreement, * * * it has no such absolute duty at the agreement's termination." Pet. App. 11a. Noting that "[n]either the ALJ nor the Board determined that the agreements with the eight local unions that had section 9(a) bargaining status * * * were ineffectively terminated," the court stated that, when those agreements "terminated, rather than merely expired * * * and because the agreements did not provide otherwise, [ASCOA was] relinquished of any contractual or statutory obligations to the unions." *Id.* at 9a, 11a. The court concluded that ASCOA "cannot now be forced to negotiate new agreements with the unions or be prohibited from engaging in nonunion subcontracting." *Id.* at 11a.

The court distinguished *Fibreboard*, which the Board relied upon in concluding that ASCOA was obligated to bargain about the subcontracting of union work, on the ground that "[t]hat case involved an

employer's decision which did not change its basic operations," whereas ASCOA sought "to fundamentally change the nature of [its] base business from construction to service." Pet. App. 11a, 15a. The court concluded that the "more pertinent" authority was *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), which held that an employer's unilateral decision "to cut back and terminate certain union employees" was not an unfair labor practice, where that decision "involved 'a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all.'" Pet. App. 12a (quoting *First National Maintenance*, 452 U.S. at 677). The court also noted that "neither *Fibreboard* nor *First National* involved the case where, as here, the employer and the local unions had already bargained and provided for the specific right to subcontract or to layoff for economic reasons." *Id.* at 13a.

b. On the Section 8(a)(3) discrimination issue, the court acknowledged that the Board had found that "the benefits expected to result from the Neutral Plan," such as "gaining control of labor costs" and "eliminating labor negotiations," constituted "direct evidence that [ASCOA's] actions of subcontracting unit work and discharging unit employees were motivated by anti-union animus." Pet. App. 14a. The court also recognized, however, that ASCOA "expected the Neutral Plan to result in the reduction of vehicle costs, the elimination of road tool costs, and entrance into the residential market"—which would be "legitimate reasons for the decision to adopt the Plan" as would be "the desire to fundamentally change the nature of [ASCOA's] base business from construction to service." *Id.* at 14a-15a. The court concluded that, regardless "whether [ASCOA] ha[d]

met [its] burden" under Section 8(a)(3) of demonstrating that it would have adopted the Neutral Plan in the absence of the employees' union representation, ASCOA's "actions were justified under the subcontracting provisions of the parties' collective bargaining agreement." *Id.* at 15a.

c. Judge Ryan dissented from the panel majority's ruling on the Section 8(a)(3) issue. Pet. App. 15a-21a. While expressing "considerable doubt" as to the Board's finding that ASCOA's subcontracting decision violated Section 8(a)(3), he reasoned that, "given [the ALJ's] assessment of the credibility of the witnesses, there is substantial evidence justifying the conclusion that the employer's subcontracting decision was, in fact, discriminatory." *Id.* at 17a. He added that the majority's reference to the contractual subcontracting clauses "begs the question" of "whether [ASCOA's] actions were, indeed, taken 'under the subcontracting provisions of the parties' collective bargaining agreement' or were taken for the forbidden discriminatory reason of anti-union animus aimed at simply ridding the employer of the financial burdens of a portion of its unionized workforce." *Id.* at 21a.[4]

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[4] Judge Ryan agreed with the panel majority that ASCOA had no duty to bargain under Section 8(a)(5) with respect to its decision to subcontract the work of the bargaining units. Pet. App. 15a-16a. He concluded, however, that "the absence of the duty arises from the terms of the collective bargaining agreement, and not from any supposed distinction between the 'expiration' of the agreement and its 'termination.'" *Id.* at 16a.

DISCUSSION

1. Petitioner contends (Pet. 10, 13-21) that the right of employees under Section 8(a)(3) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(3), to be free from adverse employer action designed to discourage union membership cannot be waived through the collective bargaining process. Petitioner views the court of appeals as having held otherwise in stating that, "[r]egardless of whether [ASCOA] ha[s] met [its] burden" of proving that "the adverse action would have occurred in the absence of union representation of [its] employees," ASCOA's action was "justified under the subcontracting provisions of the parties' collective bargaining agreement." Pet. App. 15a.

Contrary to petitioner, we do not read the court's opinion as setting forth any rule of general application with regard to waivers of employees' rights under the Act. The court did not explicate its decision on the Section 8(a)(3) issue beyond the few words quoted above. See Pet. App. 15a. Much less did the court address whether, or to what extent, its decision is consistent with those of this Court or other courts of appeals. It thus appears that the court perceived its decision as being limited to the particular facts of this case. Moreover, because ASCOA did not raise the subcontracting clause as a defense to the Section 8(a)(3) charge before the National Labor Relations Board or in its opening brief in the court of appeals (see NLRB Reh'g Pet. 6), the court did not have the benefit of the Board's or petitioner's analysis of the implications of such a defense. We therefore believe

that the court's treatment of the Section 8(a)(3) issue does not merit this Court's review.[5]

2. Petitioner further contends (Pet. 10-11, 21-25) that the court of appeals erred in failing to apply a "clear and unmistakable" waiver standard, and thereby deepened a conflict among the circuits, in concluding that the subcontracting clause constituted a waiver of the employees' right, under Section 8(a)(5), to bargain over ASCOA's decision to implement the Neutral Plan. The administrative law judge did not indicate that he was applying a "clear and unmistakable" waiver standard, however, when he declined to construe the subcontracting clause as authorizing ASCOA to subcontract out all of its sprinkler fitter work. See Pet. App. 83a. Nor did the court of appeals reject the "clear and unmistakable" waiver standard in construing the subcontracting clause as providing such authorization. See *id.* at 8a-9a. The court's broader interpretation of the subcontracting clause does not, therefore, appear to turn on

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[5] The court's disposition of the Section 8(a)(3) issue may well have been colored by its skepticism, shared by the dissenting judge, as to the Board's finding that ASCOA's subcontracting decision was primarily motivated by anti-union animus. See Pet. App. 14a-15a (noting that ASCOA had several "legitimate reasons for the decision to adopt the [Neutral] Plan"); *id.* at 17a (Ryan, J., dissenting in part) (expressing "considerable doubt" about the Board's findings on the Section 8(a)(3) issue). Of course, even if this Court were to grant the petition for certiorari and ultimately to hold that the existence of the subcontracting clause did not preclude a Section 8(a)(3) claim, the court of appeals would still be free to consider on remand whether to deny enforcement of the Board's remedial order on the alternative ground that the Board's finding of a Section 8(a)(3) violation was not supported by substantial evidence.

the legal standard necessary to establish a waiver of rights under the Act.[6]

In any event, the court of appeals' opinion can be read as holding that, even apart from the subcontracting clause, ASCOA had no Section 8(a)(5) obligation to bargain with the Union over the Neutral Plan. The court explained that the situation here, unlike that in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), involved "a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all." Pet. App. 12a (quoting *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 677 (1981)). The court thus viewed this case as involving a situation more like that in *First National Maintenance*, which held that the Act did not mandate bargaining about an employer's decision to change significantly the nature of its business. *Id.* at 12a-13a. The court's conclusion that ASCOA's subcontracting decision more closely resembled the situation in *First National Maintenance* than in *Fibreboard* turns on the particular facts of this case and, consequently, is not of sufficiently broad significance to warrant this Court's review.[7]

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[6] The Sixth Circuit has expressly applied the "clear and unmistakable" waiver standard in several recent cases. See, *e.g.*, *Gratiot Community Hosp.* v. *NLRB*, 51 F.3d 1255, 1260 (1995); *NLRB* v. *Centra, Inc.*, 954 F.2d 366, 371 (1992), cert. denied, 513 U.S. 983 (1994); *NLRB* v. *Brown-Graves Lumber Co.*, 949 F.2d 194, 198 (1991). In this case, the court extensively discussed *Gratiot Community Hospital*, without suggesting any disagreement with that standard. See Pet. App. 7a-8a.

[7] Petitioner also challenges (Pet. 25-28) the court of appeals' conclusion that, "when the collective bargaining agreements between [ASCOA] and the unions with section 9(a) bargaining

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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status terminated, rather than merely expired, upon the respective termination dates, and because the agreements did not provide otherwise, [ASCOA was] relinquished of any contractual or statutory obligations to the unions." Pet. App. 11a. But petitioner acknowledges (Pet. 26) that this issue, standing alone, does not warrant review. We agree. The court's statement is not necessary to its ruling that ASCOA did not violate Section 8(a)(5) in the circumstances of this case. Indeed, the dissenting judge joined that ruling, although he found the majority's distinction between "termination" and "expiration" of a collective bargaining agreement not to be "meaningful * * * *in the context of this case*." Pet. App. 16a.